United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76 7052

UNITED STATES COURT OF APPEALS

For the Second Circuit

B

NELSON BUNKER HUNT, W. HERBERT HUNT and LAMAR HUNT,

Plaintiffs-Appellants,

-against-

P/S

MOBIL OIL CORPORATION, TEXACO, INC., STANDARD OIL COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD., EXXON CORPORATION, GULF OIL CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, GRACE PETROLEUM CORP. and GELSENBERG AG,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLANTS NELSON BUNKER HUNT, W. HERBERT HUNT AND LAMAR HUNT

Paul, Weiss, Rifkind, Wharton & Garrison
Attorneys for Plaintiffs-Appellants
345 Park Avenue
New York, New York 10022
(212) 644-8000

Jay H. Topkis
Daniel P. Levitt
Anthony M. Radice
Paul D. Wexler
Kenneth Berlin

Philip J. Hirschkop, Esq.
Philip Hirschkop & Associates, Ltd.
P.O. Box 1226
Alexandria, Virginia 22313

Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and other Authorities — Page

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7052

NELSON BUNKER HUNT, W. HERBERT HUNT and LAMAR HUNT,

Plaintiffs-Appellants,

-against-

MOBIL OIL CORPORATION, TEXACO, INC., STANDARD OIL COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD., EXXON CORPORATION, GULF OIL CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, GRACE PETROLEUM CORP. and GELSENBERG AG,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS

This is an appeal by plaintiffs Nelson Bunker Hunt, Herbert Hunt and Lamar Hunt* from a final judgment of the United States District Court for the Southern District of New York (Weinfeld, D.J.), dismissing one count of a four count complaint. Judgment was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

---

* The complaint herein was amended by stipulation on January 9, 1976 to add Herbert and Lamar Hunt as plaintiffs.

PRELIMINARY STATEMENT

To evade liability for the antitrust offenses charged in three of the four counts of the complaint, certain of the defendant corporations advance the bold proposition that to the extent a foreign government is allegedly implicated in the challenged conduct, or to the extent it is used by defendants to inflict injury, the defendant corporations thereby attain absolute immunity from judicial scrutiny. They insist that this is so even if they use the "hunting license" thus obtained for the explicit purpose of destroying competitors.

The District Court found this and all other versions of the "act-of-state" doctrine inapplicable to the facts pleaded in the first two counts, but pertinent to the third count. Purely on "act-of-state" grounds, it dismissed that count as a matter of law before commencement of pretrial discovery or the filing of responsive pleadings.

Both in its written opinions and in the course of oral argument, the Court manifested uneasiness as to this result. The Court conceded that, in its judgment, the question was a close one. And it emphasized that, in light of recent disclosures concerning the misconduct of multi-

national corporations abroad, including several of the named defendants, there was doubt about the continued viability of the more expansive aspects of the "act-of-state" doctrine. But it concluded that reconsideration of the doctrine as it applies to Count 3 should be left to the appellate courts. To expedite such appellate consideration, the Court on January 22 entered final judgment under Rule 54(b), conditioned upon expeditious prosecution of this appeal.

ISSUES PRESENTED

The issues presented on this appeal are:

1. Did the District Court err in concluding, prior to trial and the commencement of discovery and solely on the basis of the complaint, that plaintiffs beyond doubt can prove no set of facts that would entitle them to relief under the claim asserted in Count 3?

2. Does the "act-of-state" doctrine apply at all where the plaintiff does not name any government or governmental official as a party, does not complain as to the validity of any governmental act, does not allege wrongful procurement of governmental action and challenges only conspiratorial acts by wholly private parties?

3. As pleaded, does Count 3 require the District Court to inquire into the validity of acts by the government of Libya or to otherwise pass judgment upon the conduct of that government?

4. Must the "act-of-state" doctrine be construed, for Sherman Act purposes, to grant competitors, who directly or indirectly implicate a foreign government in their conduct or use it as an instrumentality of harm, immunity from judicial review and a "hunting license" to destroy competitors?

5. If the "act-of-state" doctrine, as conventionally interpreted, immunizes from review the conduct complained of in Count 3, should such an interpretation be reconsidered in light of current doctrinal trends and recent disclosures concerning the manner in which multi-national corporations, including several of the named defendants, conduct their dealings with foreign governments?

6. Is plaintiffs' right to prosecute Count 3 controlled by the decisions in Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92 (C.D. Calif. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. den., 409 U.S. 950 (1972) and American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), relied upon by the District Court? Or, on the

other hand, is the ability of Count 3 to withstand a pretrial motion to dismiss governed by such decisions as United States v. Sisal Sales Corp., 274 U.S. 268 (1927), Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) and Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)?

STATEMENT OF FACTS

The Background Facts

In 1957 plaintiffs, doing business as Nelson Bunker Hunt [and hereinafter collectively referred to as "Hunt"], obtained an oil concession in a section of Libya not then believed to have much potential. In 1960, with the approval of the Libyan Government, a one-half undivided interest in the concession was assigned to defendant British Petroleum [hereinafter "BP"]. In November of 1961 some 11 billion barrels of low-sulphur oil were discovered on this concession, making it -- the Sarir Field -- one of the world's half dozen largest oil fields. Sarir came on stream in January of 1967. Production eventually reached a level

of 450,000 barrels per day, shared equally by Hunt and BP. (JA 16-17)

Oil production in Libya did not begin until 1961. In contrast to the Persian Gulf where the major integrated oil companies dominated production, much Libyan production was in the hands of independent, non-integrated oil producers like Hunt. By the late 1960's, these independents had expanded their share of Libyan production and were intruding upon world markets previously the sole domain of the majors. (JA 15-16)

For years, the arrangements pursuant to which the oil companies operated in the Persian Gulf, in Libya, and in other foreign areas had remained essentially unchanged. But in 1969 the development of a more militant spirit among the oil-producing nations who were members of OPEC, and the rise to power in Libya of Colonel Qaddafi, jeopardized the status quo. The spectre arose of Libya's wresting harsh terms, which would then be used to justify even greater demands elsewhere. This "leap-frogging" process might become self-perpetuating. (JA 15-18)

In September of 1970 Libya successfully extracted from all the producing companies an agreement which radically increased Libya's "take" from crude oil production. This success was achieved by singling out a so-called "independent"

-- defendant Occidental Petroleum (hereinafter "Occidental") -- bringing it to terms with a shrewd combination of threats and inducements. Because the independents did not have massive crude oil reserves in other parts of the world to compensate for any Libyan shut-in, they were exceedingly vulnerable to threats of being curtailed. On the other hand, there were attractive bonuses for being the first to accept new terms. Occidental, for example, was subjected to harsh cutbacks during the course of negotiations, but was then allowed to expand production sharply, even imprudently, when it accepted Libya's demands. Once Occidental surrendered, the others fell into line. (JA 17)

Fearful that this tactic would be repeated and that increasingly costly terms arrived at in Libya would spread to the Persian Gulf where they had much larger oil reserves and greater current production, the so-called "Seven Sisters" -- the seven largest oil producers* -- determined that a united front was essential as a counterweight. When Libya, its appetite only whetted by the September 1970 agreements, on January 2, 1971 presented even greater "non-negotiable" demands to two Libyan independents, including Hunt, the seven majors met secretly to devise a joint strategy. (JA 18)

---

* Defendants Exxon, Mobil, Shell, British Petroleum, Texaco, SoCal and Gulf.

At secret meetings in New York, the seven majors agreed to construct an industry-wide front to negotiate with all OPEC countries. Such concerted action by supposed competitors was deemed to require assurance against the threat of prosecution by American authorities, and the outline of the plan was therefore communicated to the Departments of State and Justice. The Justice Department indicated its then present intention not to prosecute, but suggested that the Libyan independents be included. The independents were invited to participate in the secret meetings, which continued in New York City through the first half of January 1971. (JA 18-19)

In order to strengthen the willingness of the independents to stand up to the Libyans and thereby avoid another debacle, the majors proposed a so-called "sharing agreement" pursuant to which any Libyan producer shut down or partially cut back for resisting Libyan demands might obtain substitute crude oil from the other signatories -- first, from Libyan production if available, and, if not, from Persian Gulf production, if any. (JA 19-21; the agreement itself, hereinafter referred to as the Libyan Producers Agreement or the LPA, is set out at JA 39-45)

Many of the companies were euphoric regarding the likely effectiveness of this industry united front with its oil-sharing arrangements. This euphoria did not, however,

cause the seven majors to overlook a unique opportunity to obtain control over the freedom of actions of the Libyan independents and restrict their ability to make competitive inroads into markets previously reserved to the majors. The freedom of any participant to enter into any agreement with the Libyan Government was curbed; the consent of the others would be necessary. Even more important in locking the independents into line, any who left the fold faced the threat of losing their entitlements under the LPA while retaining their obligations -- a fearfully one-sided arrangement. (JA 20-21, 39-58)

Although the seven majors were prepared to make their Persian Gulf crude available to the other signatories in certain circumstances, they were determined that such crude should not be used to permit the independents to "poach" upon the majors' private preserves. Over Hunt's objections, the majors insisted upon imposing a resale restriction. Any Persian Gulf crude obtained under the LPA could not be freely resold, but would be available only for resale to "pre-existing" customers in Europe and the Western Hemisphere. Hunt, whose only "pre-existing customers" were Exxon, Shell and Hess -- themselves signatories to the LPA -- found himself over a barrel, with no alternative outlet for any Persian Gulf crude

received under the LPA and compelled to take whatever price these customers might deign to offer. (JA 28-31)

Within weeks of the execution of the LPA on January 15, 1971, industry "unity" dissolved. Under pressure from the majors, the two-week old policy of dealing with all OPEC nations together was utterly abandoned; separate negotiating teams were assigned to negotiate -- separately -- with the Persian Gulf countries and with Libya. The majors proceeded to manipulate the parties to the LPA and the mechanisms created to implement it so as to avoid the evil they feared -- that an independent would give Libya more favorable terms, which example would then be followed or exceeded in the Persian Gulf, perhaps causing Libya in turn to attempt to "leapfrog" these achievements. The majors determined, in short, that the tail would not wag the dog -- the vulnerability of the Libyan independents would not be permitted to lead to arrangements adverse to themselves in the Persian Gulf. (JA 22-27)

With the unexpected nationalization of BP by the Libyan Government on December 7, 1971, the oil exchange features of the LPA came into play. Under the LPA, the Libyan producers were required to provide oil to BP, thereby themselves incurring entitlements against Persian Gulf production. When Hunt, at the majors' urging, refused Libyan demands that he market

BP's share of Sarir production, he thereby became a special target of Libyan efforts to obtain constantly more favorable terms. (JA 24-25) Strenuous measures were taken by the defendants to cause him to withstand Libya's threats and blandishments. In October of 1971 memoranda of intent and confirmation had been entered into to clarify that the LPA applied to cutbacks or shut-ins related to such pressures. (JA 23-24, 46-51) On December 13, 1971, another memo was signed to stiffen Hunt's resistance. (JA 24, 52-54) On November 21, 1972, the LPA was extended through 1974 in order to provide Hunt with apparently greater protection against increased pressure from the Libyan Government. (JA 25, 55-58) As a result, and in reliance upon assurances from the defendants that they would provide the oil needed to maintain his position should he be cut back or shut-in and would seek common terms applicable to all, Hunt continued to say "no." (JA 26)

Sharp cutbacks were in fact imposed upon him by Libya. For a time, the parties lived up to their contractual commitments to Hunt. But as compliance grew more burdensome and the price of crude oil rose on world markets, fidelity to

the LPA began to falter. First, the quality of oil supplied deteriorated; in place of the valuable light oils produced in Libya and in certain portions of the Persian Gulf, less desirable heavy crudes began to be supplied. One producer after another sought to take advantage of provisions permitting substitution of nominal amounts of cash in cases of "unavailability" of oil. Finally, after Hunt was nationalized in May of 1973 for his continued resistance to Libya's demands that he surrender to the government an equity interest in his concession, his brethren collectively chose to withhold oil from him (JA 26-27, 31-32)

From the outset, Hunt had spoken out. Before the LPA was signed on January 15, 1971, he had strenuously objected to the resale restriction and other aspects of the proposed agreement. (JA 19-20) His objections were renewed, most vigorously when the LPA was extended in November of 1972. At that point, Hunt expressly complained that his three pre-existing customers -- who were also parties to the LPA -- were exploiting the clause to extort unduly favorable prices from him. (JA 25, 29) Hunt was also insistent that the other parties live up to their objections to provide oil when it was due, and not resort to the

subterfuge of cash on account of the alleged non-availability of oil. (JA 26-27) Finally, when the quality of oil supplied deteriorated and when the signatories in near unison chose massively to withhold the oil due, Hunt threatened to enforce his rights in the courts. In 1974 he brought suit in the United States District Court for the Northern District of Virginia, charging defendant Mobil with breach of contract and conspiracy to disadvantage Hunt in favor of the majors' Persian Gulf interests. In March of 1975, that suit was recommenced in amended form in the Southern District of New York. Ten companies were named as defendants in a four-count complaint.

The Complaint:

Count One charges that the "pre-existing customer" clause of the LPA was an unlawful resale restriction imposed by his direct competitors upon Hunt over his objections -- a per se violation of the antitrust laws. The count alleges that as a result of this resale restriction, Hunt received less than he was entitled to for some 35 million barrels of Persian Gulf oil supplied under the LPA, because he had been forced to sell to three co-signatories who knew that he had no alternative outlet and would lose the oil unless he bowed to their terms. (JA 28-31)

Count Two alleges that the ten named defendants conspired to withhold from Hunt substantial quantities of oil -- 90 million barrels. (JA 31-32)

Count Three, the only count now before this Court, alleges that the seven major oil companies conspired in violation of Section One of the Sherman Act and Section 73 of the Wilson Tariff Act to use the LPA and the control it gave them over the independents' freedom of action to advance their own interests in the Persian Gulf at the expense of Hunt and the other Libyan independents, that they conspired to eliminate him as a competitor, and that they knowingly induced him to resist Libyan demands beyond the point of no return. Among the specific well-pleaded allegations applicable to Count Three are that: A major purpose of the LPA was to enable the majors to impose competitive disadvantages upon the independents and to prevent them from accepting terms in Libya adverse to the majors' Persian Gulf interests. The LPA and the machinery created to implement it were used by the majors to manipulate the course of negotiations in Libya. Among their objectives was creation of competitive advantages for their own Persian Gulf crude. In November 1972 Hunt was induced to reject Libyan demands in order that the majors might themselves secretly negotiate more favorable terms in the Persian Gulf.

The majors were prepared to and did cause Hunt to take positions they knew would needlessly result in his nationalization. Count Three does not allege that any defendant procured any action by the Libyan Government, and it complains of no act by the government or by any official. The count is directed solely to the alleged misconduct of the seven majors. (JA 33-37)

Count Four alleges breach of contract in that the named defendants failed to discharge their obligations to provide 90 million barrels of oil to Hunt when they were required to do so under the LPA. (JA 34-35)

The Proceedings Below:

Prior to answer and before discovery, certain of the defendants* moved to dismiss the complaint on the scattershot of largely irrelevant grounds customarily asserted by defendants at the commencement of antitrust cases. (JA 59-66) As to the three antitrust counts, the defendants sought dismissal on grounds that their competitor and co-signatory Hunt was somehow outside the "target area," that causation was insufficiently pleaded, that the in pari delicto doctrine applied and, among other things, that the "act-of-state" doctrine bars recovery.

---

* All but Gelsenberg and Shell.

The Decision Below:

On November 5, 1975, the District Court, in a 42-page opinion not yet officially reported (JA 67-109), denied each and every defense asserted by the defendants -- with one exception. Expressing doubts about the continued viability of the full reach of the "act-of-state" doctrine in the face of recent disclosures regarding how multi-national companies, including several named defendants, deal with foreign governments, but leaving "reassessment of the range of the doctrine" to the appellate courts, the District Court ruled that the doctrine barred recovery under Count Three as a matter of law. The District Court speculated that to adjudicate the claims asserted in Count Three, it

> "would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions." (JA 99-100)

Plaintiffs sought entry of final judgment pursuant to Rule 54(b). On January 22, 1976, the District Court entered the order sought. (JA 122-124) It noted:

> "Since the filing of the court's opinion on November 5, 1975, there have been further public disclosures of dealings of multi-national corporations with foreign governments, including payments to influence action of such governments or their officials which have an adverse impact upon American interests and concerns. The current exposures warrant consideration in the Public interest of the continued viability of the "act of state" doctrine, which, if modified in any respect, may have a direct and significant bearing upon plaintiff's third claim."

ARGUMENT

Summary of Argument

This appeal raises a single legal issue: whether, in the context of a pretrial motion to dismiss a complaint, the so-called "act-of-state" doctrine applies to and bars recovery under the facts pleaded in Count 3.

1. The "act-of-state" doctrine does not apply to Count 3. Under that count, Hunt is entitled to prove any set of facts that does not require the trial court to pass upon the validity of any governmental act. He will prove that the seven majors conspired to manipulate events so as to advantage themselves at his expense, that they conspired to put him out of business. He will prove -- it is not disputed -- that all he had to do to avoid nationalization was to respond affirmatively to the Libyan demand that he surrender an equity interest in his concession. Hunt was nationalized because he refused to do so. The other independents survived because they yielded -- after seeing what happened to Hunt. Hunt refused because he was induced to do so by the seven majors, who conspired among themselves to cause him to refuse. Their motive was to defer any decision upon equity participation in Libya as long as possible. They induced

Hunt to resist participation with false assurances regarding the benefits he would receive if he continued to resist. Having obtained the delay they sought, they abandoned Hunt when it was too late for him to undo the damage. The only questions at trial of this issue will be why Hunt did what he did, whether the seven major oil company defendants induced him to do what he did, and what their motives were. What the position of the Libyan Goverment was is not in dispute. Should it be disputed, evidence of what that position was is available that does not draw into question the validity of what Libya did. In short, adjudication of Count 3 has nothing to do with any "act of state."

2. No viable precedent requires application of the "act-of-state" doctrine to immunize the conspiratorial acts of private persons seeking to destroy a competitor or to gain competitive advantage, at least not in the circumstances of this case. The decisions relied upon by the District Court, the old American Banana and the Buttes Gas cases, are not in point. The former turned upon jurisdictional considerations long ago abandoned, while the latter involved the necessity for judicial inquiry into sovereign acts. Apposite, rather, are such cases as Sisal Sales, Continental Ore, and Zenith Radio. These make clear that when private parties do utilize foreign government officials to accomplish their own

anti-competitive purposes, they do not thereby escape accountability under the Federal antitrust laws.

3. In the event this Court should somehow conclude that conventional interpretations of the "act-of-state" doctrine do require its application in the circumstances of the present case, it should reconsider the reach of that doctrine. Each day the newspapers report new disclosures of the way in which multi-national corporations routinely purchase the services of key foreign officials. Increasingly, in this age of planned economies, the ability of companies successfully to do business abroad turns upon the willingness of their foreign officials to grant concessions, permits, contracts, or other benefits. This Court must not put its imprimature upon the scandalous suggestion that companies may -- with utter impunity -- eliminate their competitors by implicating one of these complaisant officials in their schemes. Several of the named defendants here have publicly confessed to making payments to foreign officials in order to induce them to advance their patron's competitive position. Such payments must not be held to confer "hunting licenses." If the judicially created "act-of-state" doctrine, in its present configuration, authorizes so enormous a loophole in the antitrust laws, it must receive immediate judicial surgery. Such surgery would be consonent with the general doctrinal trend, for the Supreme Court has recently asked counsel in a pending case to argue the viability of the

"act-of-state" doctrine, and the Department of State has informed the Court that it foresees no harm to the conduct of foreign policy if the "act-of-state" doctrine is sharply curtailed.

POINT I

THE "ACT-OF-STATE" DOCTRINE DOES NOT APPLY TO COUNT 3

A. The District Court Gave Too Expansive A Reading to the Doctrine

In dismissing Count 3, the District Court reasoned that the injury complained of resulted from Hunt's nationalization by the Libyan government, that the "act-of-state" doctrine precluded it from making an inquiry into the circumstances leading to that act and that the claim must therefore be dismissed. This was too expansive an interpretation of the doctrine.

There is no rule broadly immunizing governmental acts or officials from participation in litigation. In a wide range of situations, the right judicially to inquire is well-established. Early in the life of the Republic, for example, the Supreme Court adopted the principle that when a government "becomes a partner in any trading company," it and its officials may have to answer in court like any private person. Bank of the United States v. Planters' Bank of Georgia, 9 Wheat. 904, 907 (1824) (Marshall, C. J.). Until 1952 this doctrine was applied to foreign governments only when they acted through separate commercial instrumentalities. That limitation was removed in 1952 when the State Department published the so-called "Tate Letter", making foreign

governments themselves answerable in our courts with respect to acts of a commercial nature, even when they acted directly and not through separate instrumentalities. 26 Dept. of State Bull. 984 (1952). This Court has, in the wake of this softening of the doctrine, repeatedly held foreign governments themselves answerable for what it deemed to be commercial acts, rejecting spurious attempts to invoke expansive notions of sovereign immunity and "act of state." See, for example, such leading cases as Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), cert. den., 381 U.S. 934 (1965); Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Com., 360 F.2d 103 (2d Cir. 1965), cert. den., 385 U.S. 931 (1966); F. Palicio Y. Compania S.A. v. Brush, 375 F.2d 1011 (2d Cir.), cert. den., 389 U.S. 830 (1967); and Mendenez v. Saks and Company, 485 F.2d 1355 (2d Cir. 1973), cert. granted sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 416 U.S. 981 (1974); reargument ordered, 422 U.S. 1005 (1975).

The scope of the "act-of-state" doctrine was authoritatively defined by the Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). The Court explained, in Sabbatino, that the doctrine

> "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." 376 U.S. at 401. (Emphasis added)

What is prohibited, at least in some circumstances, is the "[sitting] in judgment on the acts of the government," Underhill v. Hernandez, 168 U.S. 250, 252 (1897), and "[judging] the acts of a foreign sovereign," First National City Bank v. Banco Nacional de Cuba, 406 U.S. at 767. The reason for wishing to avoid inquiry into the "validity" of such "public" acts is the desirability of avoiding affronting sovereign governments by charging them with illegal conduct, the absence of readily available legal standards with which to measure the legality of governmental conduct, and the potential of interference with the conduct of foreign relations. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 427-437; First National City Bank v. Banco Nacional de Cuba, 406 U.S. at 767-768.

This Court was perhaps the first to point out that the thrust of the "act-of-state" doctrine is not generally to immunize governments and their officials from participation in litigation, but that it only restricts examination of

> "the acts of a foreign sovereign... in order to determine whether or not those acts were legal under the municipal law of the foreign state." Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438, 443 (2d Cir. 1940).

See also, Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 249 (2d Cir.), cert. den., 332 U.S. 772 (1947).

It is not even true that American courts are in all circumstances precluded from inquiring into the "validity" of public acts committed by foreign governments in their own territory. Nationalizations may themselves be the subject of American litigation. The so-called Hickenlooper Amendment to the Foreign Assistance Act of 1964, 78 Stat. 1013, 22 U.S.C. § 2370(e)(2), expressly authorizes judicial inquiry as to a claim of title or other right of property arising out of such a sovereign act when it is "in violation of the principles of international law" and where certain procedural requirements are met.

There is no rule that a court may not inquire into what a government did, why it did it, and even whether its action was lawful. A fortiorari, there is no rule which automatically precludes the prosecution of private parties themselves charged with violations of American law, just because foreign government officials might be called as witnesses. Had the Court below been correct in speculating that, in order to adjudicate Count 3, it would have to inquire into the circumstances of Hunt's nationalization, that prospect in itself should not have raised the "act-of-state" doctrine as a bar to prosecution.

B. Count 3 Does Not Require the Court to Question the Validity of any Government Act or to Sit in Judgment upon any Such Act

To prevail on their pretrial motion to dismiss, the defendants had to show that it was clear beyond any doubt that plaintiffs cannot conceivably prove any set of facts that would avoid legal barriers to recovery. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The question, therefore, is whether it is clear beyond doubt that plaintiffs cannot conceivably establish Count 3 without requiring the Court to adjudicate the "validity" of any act by the government of Libya.

Count 3 alleges that the seven major oil company defendants wrongfully conspired to manipulate the parties to the LPA, and the machinery created to implement it in order to advantage their own competitive position at Hunt's expense. It alleges that they wrongfully induced Hunt to reject Libya's demand for equity participation in his concession until he had passed the point of no return -- that they conspired to and did eliminate him as a competitor. Hunt alleges that everyone knew prior to his nationalization that the first independent to subscribe to the new terms would become Libya's fair-haired boy, and that accession to these terms would assure one's right to continue to do business in Libya -- as it has in fact

done for others. That Hunt did not pursue such a course he atrributes to the conspiratorial misconduct of the seven majors. The key elements in plaintiffs' case can be established without the testimony of a single Libyan witness, and without any inquiry into the validity of Libya's decision to nationalize Hunt after he refused to surrender an equity participation. The trial of such matters does not invoke the "act-of-state" doctrine as the doctrine has been defined by the courts.

In the unlikely event there is dispute at trial regarding what would have happened if Hunt had chosen to grant Libya equity participation, that issue can be resolved on the basis of testimonial and documentary evidence. Such proof should not require the presence of any Libyan witness. But even if it does, there is no rule which bars a claim because of the necessity for testimony from a government witness.* The "act-of-state" doctrine has never been so expansively construed.

On either scenario outlined above, the trial court will not be called upon to determine whether the

---

* See, for example, the practice, which has grown up over the Patent Office's objections, of calling Patent Office examiners to testify in patent litigation between private parties as to why they recommended that patents issue -- and what they would have done had "prior art" allegedly withheld been disclosed to them. See the Patent Office Manual of Patent Examining Procedure, § 1701.01, pp. 243-244, setting out the Patent Office guidelines on this practice and discussing the cases. Cf. Charles Pfizer & Co. v. Federal Trade Commission, 401 F.2d 574, 584-86 (6th Cir. 1968); American Cyanamid Co. v. Federal Trade Commission, 363 F.2d 757, 778-79 (6th Cir. 1966).

Libyan government violated Libyan law, international law or the law of any other jurisdiction. The Court will not be required to pass judgment upon what Libya did. Plaintiffs have made their peace with the government of Libya. They assert no claim against that government. What they do contend is that the major oil company defendants wrongfully and unlawfully conspired to inflict harm upon plaintiffs for their own anti-competitive purposes.

It matters not whether the actual instrumentality of the harm done happened to be a government act. Wrongdoing by a private party that causes another party to lose a government contract, for example, is actionable, despite the fact that the injury complained of results from a contract decision by government officials.* The wrongdoing is the tortious conduct of the private defendants, not that of government officials who were simply doing their job. The present case involves just such a claim. The damages here flow from plaintiffs' being deprived of profits from their former concession. They allege that this happened because of the wrongful conduct of defendants, and are prepared to prove it. No legal doctrine bars prosecution of such a claim.

---

* See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

POINT II

NO VIABLE PRECEDENT SUPPORTS DISMISSAL OF COUNT 3

A. The American Banana and Buttes Gas Cases Are Not Controlling

In concluding that the "act-of-state" doctrine requires dismissal of Count 3, the District Court relied upon an ancient decision of the Supreme Court and a more recent lower court decision. (JA 100-101) Neither is controlling.

American Banana Co. v. United Fruit Co. 213 U.S. 347 (1909), was decided on the basis of a jurisdictional approach long since abandoned by the Court. The plaintiff claimed that the defendant had caused the government of Costa Rica to have its soldiers and officials seize a portion of plaintiff's Costa Rican plantation and supplies, preventing it from carrying on business. Other misconduct in Costa Rica was charged that had nothing to do with any governmental activity. The case was easy for Mr. Justice Holmes, who had a uniquely narrow vision of the reach of the antitrust laws. Cf. Federal Baseball Club v. National League, 259 U.S. 200 (1922). To Mr. Justice Holmes it was

> "surprising to hear it argued that they [acts outside the jurisdiction of the United States] were governed by the act of Congress." 213 U.S. at 355

He pressed what he characterized as "the general and almost

universal rule" that the legality of an act "must be determined wholly by the law of the country where the act is done." 213 U.S. at 356. Defendant's acts were outside the Sherman Act because "they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute." 213 U.S. at 357. He not only found the Sherman Act inapplicable to the governmental conduct complained of but also to the purely private acts alleged to have been done in Costa Rica.

American Banana is an interesting artifact in the evolution of the antitrust laws. But it is a museum piece, not a viable judicial precedent. Since 1909, American courts have demonstrated over and over again that our antitrust laws do have extraterritorial application. See, for example, such cases as United States v. Sisal Sales Corp, 274 U.S. 268 (1927); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947); and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)

Application of American Banana to the present case is particularly inappropriate. Hunt complains of a conspiracy involving major American corporations, which met secretly in New York, Chicago and elsewhere, and which utilized an agreement

negotiated in New York and implemented by a bureaucratic organization located in New York City to restrain competition in segments of the international oil business. Hunt alleges not only a violation of the Sherman Act, but also of the Wilson Tariff Act of 1916 which on its face is expressly directed to restraints upon this Nation's foreign commerce. The latter statute was not in existence when American Banana was decided. When the defendants in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), sought to shield their Canadian activities from the antitrust laws on the basis of American Banana, the Court gave them short shrift, observing:

> "But in the light of later cases in this Court respondents' reliance upon American Banana is misplaced. A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." 370 U.S. at 704.

Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), aff'd per curiam, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972), is an exotic growth. It also involved the alleged deprivation of plaintiff's oil concession. It too, was dismissed on the basis of American Banana. There, however, the similarity ends. Buttes Gas arose out of an international dispute involving division of waters of the Persian Gulf. Plaintiffs and the defendants had

off-shore oil concessions granted by two adjacent sheikdoms. Plaintiffs alleged that the defendants had instigated the boundary dispute, which led to plaintiffs' being deprived of access to their concession. The trial court noted that plaintiffs sought not only damages but also an injunction protecting their right to extract oil from the disputed area, and that its decision on the injunction would necessitate determination of the boundary claims. 331 F.Supp. at 104. It concluded that "The determination of foreign states' boundaries is certainly not a permissible function of this Court." 331 F.Supp. at 103. Plaintiffs' monetary claims were dismissed on the basis of the "act-of-state" doctrine. The Court rejected -- as inconsistent with the pleadings which named one of the sheikdoms as a co-conspirator -- plaintiffs' belated contention that they were not requesting a determination of the validity of any governmental act. And the court concluded that, in order to recover, plaintiffs would have to prove both that the conspiring sheikdom "had issued a fraudulent territorial waters decree" and that defendants had induced the government of Iran to assert claims which interfered with plaintiffs' rights. 331 F.Supp. at 110.

Whether the court correctly read the complaint and correctly defined plaintiffs' evidentiary burden may be questioned. What is clear is that, given these determinations, the court's

conclusions do not control the present case where no government is named as a co-conspirator, where no illegality is charged to any government, where no procurement of government action is alleged, and where the court is not asked to function as an international boundary commission.

B. Count 3 Is To Be Measured, Instead, By Such Decisions as Sisal Sales, Continental Ore, and Zenith Radio

The District Court and the court in Buttes Gas both relied, incorrectly, upon the decision of Mr. Justice Holmes in American Banana. That American Banana does not immunize from the antitrust laws private parties who eliminate competitors by misconduct abroad, even misconduct involving foreign governments, has been clear at least since the decision in United States v. Sisal Sales Corp., 274 U.S. 268 (1927). Defendants' alleged monopoly was achieved, in part, by obtaining discriminatory legislation in Mexico and Yucatan and by manipulation of banking facilities and markets so as to destroy all competitors. Untroubled by Mr. Justice Holmes' earlier abhorrence of extraterritorial application of American law, the Court now concluded that both the Sherman Act and the Wilson Tariff Act applied to such misconduct abroad. No exception was carved out for the involvement by the defendants of the governments of Mexico and Yucatan. The Court expressly declined to follow American Banana. It said:

> "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." 274 U.S. at 276.

It added that the Wilson Tariff Act, not in effect at the time of American Banana, "plainly denounced" such interference with this country's foreign commerce.

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), underscores the validity of Count 3. Plaintiffs there alleged that they had been excluded from the Canadian market by the defendants who had achieved a monopoly in ferro-vanadium and vanadium oxide. Plaintiffs contended, among other things, that their Canadian business had been destroyed because the defendants had caused the agent of the Canadian government to refuse to purchase from them. The Supreme Court again rejected the applicability of American Banana, noting its narrow jurisdictional base. Instead, it followed Sisal Sales and expressly observed that plaintiffs

> "Do not question the validity of any act taken by the Canadian Government or by its Metal Controller. . . . What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. As in Sisal, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government."
> 370 U.S. at 706.

The Court concluded, in language absolutely determinative of the present case,* that

> "The offer of proof at least presented an issue for the jury's resolution as to whether the loss of Continental's Canadian business was occasioned by respondents' activities." 370 U.S. at 706.

Zenith Radio Corp. v. Hazeltine Research Inc., 375 U.S. 100 (1969), also bears strongly upon the issues raised by the decision below, for it establishes the proposition that in order to recover under the antitrust laws a plaintiff need not show that the defendants and no one else contributed to his injury, but that it is enough that he shows that the defendants' conduct contributed materially thereto. As the Court said

> "It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden in proving compensable injury under § 4." 395 U.S. at 114 n. 9.

In this respect, the Court merely reiterated a principle announced in Continental Ore, 370 U.S. at 704-06.

---

* It is no answer to the force of this case that no Canadian government official approved of the monopoly. In the present case, the alleged conspiracy -- as well as the LPA itself -- was kept secret from the Libyan government, which was as much a victim of the conspiracy as was Hunt.

POINT III

IF THE "ACT-OF-STATE" DOCTRINE, AS CONVENTIONALLY CONSTRUED, REQUIRES DISMISSAL OF COUNT 3, THE REACH OF THE DOCTRINE SHOULD BE REAPPRAISED

Both in its opinion dismissing Count 3 (JA 102), and in its opinion ordering entry of final judgment (JA 123), the District Court expressed uneasiness about any expansive construction of the "act-of-state" doctrine at a time when disclosures are being made that many multi-national corporations, including several of the named defendants, secretly make massive payments to foreign government officials in order to promote corporate objectives. Indeed, this concern played a role in the Court's decision to enter judgment under Rule 54(b). But the Court concluded that "in the absence of new doctrinal trends," such reconsideration must be left to the appellate courts. (JA 102)

Should this Court determine, despite the fact that plaintiffs do not challenge the validity of any act of the Libyan government, that the "act-of-state" doctrine as conventionally construed requires dismissal of Count 3, it should reconsider the reach of the doctrine and trim it back so as to avoid licensing the conduct here complained of. As applied below, the doctrine creates a gaping hole in the

enforcement of the antitrust laws. It appears to confer immunity upon powerful private parties who succeed in implicating foreign governments in their schemes to destroy unwanted competitors, or who manage to use foreign governments as instrumentalities to accomplish such results. There is ample warrant for defining the "act-of-state" doctrine so as to avoid any such result.

A. "New Doctrinal Trends" Encourage Such Redefinition

There are "new doctrinal trends" moving in plaintiffs' direction. As we have developed under Point I, the evolution of the law has persistently been in the direction of removing restrictions upon suits involving foreign governments. The Tate Letter of 1952 was one such milestone. The Supreme Court decisions in Sabbatino and First National City Bank were others. This Court has itself played a prominent role in stripping away spurious defenses based upon overblown notions of sovereign immunity and "act of state."

The trend is accelerating. In reviewing a recent decision of this Court, the Supreme Court has on its own motion requested counsel to reargue the case and focus on the question whether the "act-of-state" doctrine should be

further curtailed. See Alfred Dunhill of London, Inc. v. Republic of Cuba, 422 U.S. 1005 (1975). Responding to that invitation, the Solicitor General of the United States last December filed a brief amicus curiae strongly urging further cutbacks in the "act-of-state" doctrine. The Solicitor General points out that courts in this country and abroad are relaxing such restrictions. He urges that at a time when American businesses are increasingly dependent upon foreign markets and their success increasingly subject to decisions and actions by foreign governments, there is increasing need to spread to such areas the rule of law. The Solicitor General recognizes that there may be a hard core of situations involving public acts by foreign governments solely in their own territory and measurable by no easily available legal standard. But such cases are few.

In support of his position, the Solicitor General filed with the Supreme Court a five-page letter from Monroe Leigh, Legal Advisor to the Department of State. That letter, expressing the Department's views, is appended to this brief as an Appendix. The State Department notes the strong trend in other countries away from immunity and in the direction of adjudication. It concludes that:

> "In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in Sabbatino so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States."

Strong doctrinal trends do run against the kind of privilege boldly sought by defendants. Should this Court determine that it must reach the question, it should follow these trends and hold that the "act-of-state" doctrine does not confer immunity from judicial scrutiny upon private parties who implicate foreign governments in their anti-competitive schemes or who utilize foreign governments as instrumentalities of such schemes.

B. The Doctrine Lends Itself to Judicial Redefinition

In First National City Bank v. Banco Nacional de Cuba, the Supreme Court emphasized the flexibility of the "act-of-state" doctrine and its susceptibility to being refashioned in order to avoid undesirable results. Writing for the Court, Mr. Justice Rhenquist noted that the doctrine was

> "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government." 406 U.S. at 762.

He added that

> "It is clear, however, from the history and opinions of this Court that the doctrine is not an inflexible one." Id. at 763

It is important to note that First National City Bank arose in the context of an expropriation of assets by a foreign government. Mr. Justice Powell, concurring in the judgment of the Court, observed that

> "I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process." 406 U.S. at 774-775.

C. Recent Disclosures of Payments to Foreign Officials Require a Narrowing of the "Act-Of-State" Doctrine

The Solicitor General and the Department of State rely heavily, in coming to their positions in Alfred Dunhill, upon the increasing role of American businesses abroad. They conclude that these businesses must not be abandoned to the not always tender mercies of foreign governments and urge further curtailment of the "act-of-state" doctrine. The disclosures concerning the conduct of multinational corporations in relations with foreign officials prompts the same conclusion. This is no abstract question. Several of the named defendants in this case have publicly admitted that over the years they have paid millions of dollars to officials ranging from presidents to lowly but influential purchasing officers. The disclosures concerning defendant Gulf Oil Corporation are a sad landmark in recent business history.

These same defendants, having admitted to purchasing the favors of government officials around the world, now ask this Court to immunize from judicial review any assistance they get from such officials in destroying unwanted competitors. That is what is at stake in this litigation. If the decision

below is allowed to stand, the defendants will have been given a "hunting license" to destroy competition, the only requirement for immunity being that they involve their foreign clients in their unlawful schemes.* That cannot be the law. If it is the law as a legacy from more gullible generations, the time has come to adjust law to reality.

---

* When taxed with the contention that what they sought was a "hunting license" to eliminate competitors, defendants in oral argument on the motion to dismiss did not deny the charge. Counsel for defendant Socal responded as follows:

> "With respect to the hunting license, you could say that the labor union in Apex [Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)] was given a hunting license to put businessmen out of business. In fact, that is what they did in Hunt v. Krumbach [Hunt v. Crumboch, 325 U.S. 821 (1945)]. And the Supreme Court said, 'That's right. If they do it by means of a strike, they have a hunting license to do that. It may be a tort, it may be a criminal act, but under the Sherman Act you've got a hunting license to do it.'" (Transcript of oral argument, p. 116)

He went on to add:

> "I say the activity in this complaint is not a common law restraint. It is international political activity." (Transcript of oral argument, p. 119)

CONCLUSION

Because the "act-of-state" doctrine does not apply to Count 3, because no viable precedent supports dismissal of Count 3, and because the doctrine can if necessary be refashioned to close the loophole in anti-trust enforcement occasioned by the dismissal of Count 3, the decision below should be reversed.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
Attorneys for Plaintiffs-Appellants
345 Park Avenue
New York, New York 10022
(212) 644-8000

Dated: March 19, 1976

Of Counsel

Jay H. Topkis
Daniel P. Levitt
Anthony M. Radice
Paul D. Wexler
Kenneth Berlin

Philip J. Hirschkop, Esq.
Philip Hirschkop & Associates, Ltd.
P.O. Box 1226
Alexandria, Virginia 22313

APPENDIX

THE LEGAL ADVISER,
DEPARTMENT OF STATE,
Washington, November 26, 1975.

DEAR MR. SOLICITOR GENERAL:

In the case of *Alfred Dunhill of London, Inc.* v. *The Republic of Cuba,* which is before the Supreme Court on petition for a writ of certiorari, No. 73–1288, the Court has requested the parties to discuss whether its holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, should be reconsidered.

The Department of State believes that the question of whether the *Sabbatino* case should be reconsidered involves matters of importance to the foreign policy interests of the United States and requests that its views be conveyed to the Supreme Court.

The views expressed herein are in addition to the arguments presented in the brief amicus curiae which the United States is filing in the *Dunhill* case. As urged in that brief, we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial, and not public, in nature. Moreover, since 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity.

In the event, however, that the Court reaches the question whether the *Sabbatino* holding should be reconsidered, we believe that the following considerations should be called to the Court's attention:

Since *Sabbatino* was decided in 1964, the Department of State has on two occasions expressed to courts in the United States its views concerning act of state adjudications. First, in the *Sabbatino* case itself, on remand, the Executive Branch declined to make a determination under the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2), "that application of the act of state doctrine is required in this case by the foreign policy interests of the United States." *Banco Nacional de Cuba* v. *Farr*, 272 F. Supp. 836, 837 (S.D.N.Y.), aff'd, 383 F. 2d 166 (C.A. 2), certiorari denied, 390 U.S. 956. Having taken note of the Executive Branch's position, the district court in *Farr* applied the Hickenlooper Amendment and held that a Cuban decree of confiscation violated customary international law. 272 F. Supp. at 838.

Second, in *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, the Department of State informed the Supreme Court that general foreign relations considerations did not require application of the act of state doctrine to bar adjudication of a counterclaim when the foreign state's claim arises from a relationship between the parties existing when the act of state occurred, and when the amount of relief to be granted is limited to the amount of the foreign state's claim.[1] Relying on the precedent of

[1] Since *First National City Bank* was decided, the Department of State has taken the position in the sovereign immunity area that even where a counterclaim exceeds the foreign state's claim, the courts may adjudicate the counterclaim if it arises from the same "transaction or occurrence that is the subject matter of the claim of the foreign state." S. 566, 93d Cong., 1st Sess., § 1607(1); see,

Bernstein v. *N. V. Nederlandsche Amerikaansche, Etc.*, 210 F. 2d 375 (C.A. 2), where the Department had advised that the act of state doctrine need not apply to a class of cases involving Nazi confiscations, the Department in *First National City Bank* concluded that the act of state doctrine need not be applied "in this or like cases."

Significantly, the *Farr, Bernstein* and *First National City Bank* cases each involved an Executive Branch determination which opened the way for U.S. courts to review an act of state on the merits under international law. In each of these cases, the claim or counterclaim in question alleged that an act of state violated customary international law. Thus, at least on a case-by-case basis, the trend in Executive Branch pronouncements has been that foreign relations considerations do not require application of the act of state doctrine to bar adjudications under international law.

This trend is mirrored in other countries. Apart from the cases cited by Mr. Justice White in *Sabbatino,* 376 U.S. at 440 n. 1, there have been several recent decisions where foreign courts have reviewed state acts under international law.[2] English law, from which our act of state doctrine derives, does not re-

---

ALI, Restatement, Foreign Relations Law of the United States, Second, § 70(2)(b). In our view, the adjudication of counterclaims against a foreign state, arising from the same transaction, occurrence or subject matter as the claim of the foreign state, does not pose foreign relations difficulties.

[2] See e.g., *In The Matter of Minera El Teniente, S.A.*, 12 Int'l Legal Materials 251 (Superior Ct. Hamburg, 1973) (a foreign state's act of expropriation that violates international law will not be recognized by German courts if the subject matter of the litigation has a substantial contract with Germany); *Braden Copper Company* v. *Le Groupement d'Importation des Metaux*, 12 Int'l Legal Materials 187 (Ct. of Extended Jurisdiction Paris, 1972)

quire British courts to abstain from reviewing state acts under international law.[3] As far as can be determined, this exercise of the judicial function in foreign jurisdictions has not caused serious foreign relations consequences for the countries concerned.

The present case is similar to *Bernstein, Farr* and *First National City Bank*. This Department is of the opinion that there would be no embarrassment to the conduct of foreign policy if the Court should decide in this case to adjudicate the legality of any act of state found to have taken place and to make such

---

(rejecting sovereign immunity of a state trading company that marketed expropriated copper); *Compagnie Francaise de Credit et de Banque* v. *Consorts Atard*, Clunet, J. de Droit Int'l, 98 (1971), p. 86 (France: Cour d'Appel Amiens, 1970) (foreign expropriation decrees will not be recognized in France absent the payment of prompt, adequate and effective compensation); *Credit Foncier d'Algerie et de Tunisie* v. *Narbonne*, Clunet, J. du Droit Int'l 96 (1969), p. 912 (France: Court de Cassation, 1969) (acts of expropriation not recognized in France unless equitable compensation is first determined); *Obester Gerichtshof* (Austrian Supreme Court), decision of 22 December 1965, Osterr. Juristenzeitung 21 (1966), p. 204, Clunet, J. du Droit Int'l, 94 (1967), p. 941 (an expropriation without compensation violates international law, but no recovery against purchasers of expropriated property); *N.V. Assurantie Maatschappij de Nederlanden van 1845* v. *P. T. Escomptobank*, 33 Int'l L. Rep. 30 (D. Ct. The Hague, 1962) (rejecting act of state defense where there is a violation of international law).

[3] *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140, 50 T.L.R. 284; *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 346; 1 Lauterpacht, *Oppenheim's International Law*, 267–68 (8th ed. 1955). See also, *Republic of Peru* v. *Peruvian Guano Co.*, [1887] 36 Ch. D. 489 and *Republic of Peru* v. *Dreyfus Brothers & Co.* [1888] 38 Ch. D. 348, where British courts, under international law, refused to give effect to Peruvian laws annulling acts of the preceding Peruvian government; cf. *Buttes Gas & Oil Co.* v. *Hammer* [1975] 2 W.L.R. 425 at 434–35.

adjudication in accordance with any principle of international law found to be relevant.

In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

Sincerely,

MONROE LEIGH.

U.S. GOVERNMENT PRINTING OFFICE: 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NELSON BUNKER HUNT, :

Plaintiff, :

-against- :

MOBIL OIL CORPORATION, et al., :

Defendants. :

----------x

75 Civ. 1660 EW

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DEBORAH MORRIS, being sworn, deposes and says:

1. I am not a party to the action, am over 18 years of age and reside at 135 East 50th Street, New York, New York 10022.

2. On March 19, 1976, I served a true copy of the annexed Memorandum of Law and Joint Appendix upon the following attorneys at the addresses listed below, by depositing the same, enclosed in properly addressed and sealed postpaid envelopes, in a depository maintained by the United States Postal Service within the State of New York:

John E. Bailey, Esq.
Law Department
Gulf Oil Company -U.S.
Post Office Drawer 2100
Houston, Texas 77001

Richard H. Zahm, Esq.
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

Robert Salman, Esq.
Phillips, Nizer, Benjamin, Krim & Ballon
40 West 57th Street
New York, New York 10019

Bruce A. Hecker, Esq.
Shea, Gould, Climenko, Kramer & Casey
330 Madison Avenue
New York, New York 10017

Gordon B. Spivack, Esq.
Lord, Day & Lord
25 Broadway
New York, New York 10004

Turner H. McBaine, Esq.
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

Leo Larkin, Esq.
Grace Petroleum Corporation
1114 Avenue of the Americas
New York, New York 10036

Robert MacCrate, Esq.
Sullivan & Cromwell
48 Wall Street
New York, New York 10005

John J. Hayes, Esq.
Windels & Marx
51 West 51st Street
New York, New York 10019

John Hupper, Esq.
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

Milton J. Schubin, Esq.
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022

Charles F. Kazlauskas, Jr., Esq.
Texaco, Inc.
135 East 42nd Street
New York, New York 10017

Deborah Morris

Sworn to before me this

19th day of March, 1976.

Notary Public

SUSAN J. OLAH
Notary Public, State of New York
No. 31-4605174
Qualified in New York County
Commission Expires March 30, 1977